Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
National Exchange Carrier Association, Inc.	)	WC Docket No. 02-340
Tariff FCC No. 5, Transmittal No. 951	)	
	)	

OPPOSITION TO DIRECT CASE

US LEC CORP.
BUSINESS TELECOM, INC.
PAC-WEST TELECOMM, INC.
ATX COMMUNICATIONS, INC.
LEVEL 3 COMMUNICATIONS, LLC
FOCAL COMMUNICATIONS CORPORATION
U.S. TELEPACIFIC CORP. d/b/a TELEPACIFIC COMMUNICATIONS
FREEDOM RING COMMUNICATIONS, LLC d/b/a BAYRING COMMUNICATIONS

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December 5, 2002

SUMMARY

NECA's proposal to change the criteria under which it may demand security deposits and to shorten the notice period for termination should be denied. NECA's proposal is unjust, unreasonable, and discriminatory in violation of sections 201 and 202 of the Act.

The Direct Case submitted by NECA to justify its proposal fails miserably. Of the 1,000 or more NECA carriers represented, the Direct Case only provides information regarding 35 of the NECA carriers. Yet, the changes proposed by NECA vest additional, extraordinary rights in all of the NECA members, not just the 35 carriers, and burdens all of the competitors of the NECA carriers. Such overarching consequences cannot be based on the input of 35 carriers. Moreover, it appears that the NECA proposals are based solely on the Global Crossing and WorldCom bankruptcies. It is unacceptable for the NECA carriers to spread the burden of these two bankruptcies on its competitors, who are already burdened by their own share of uncollectibles from these bankruptcies. In sum, the NECA Direct Case is wholly non-responsive to the Commission's Designation Order.

Furthermore, the NECA carriers are already protected under current deposit criteria and federal rate-of-return regulations. Under rate-of-return regulations, NECA carriers have received excellent returns over the past 12 years. In fact, according to the NECA Direct Case, the 2001 rates-or-return for common line and traffic sensitive pools were the 4th and 5th highest returns, respectively, over the past 12 years. NECA, however, focuses on its one year 2002 spike in uncollectibles, which NECA admits results from the two largest carrier bankruptcies, Global Crossing and WorldCom. As demonstrated by CLEC Commenters, even this one year spike represents only a

miniscule percentage of NECA carriers' revenues. In addition, this one year spike is speculative, since the claims against Global Crossing and WorldCom have yet to be settled. More importantly, NECA provides no evidence that this one year spike will repeat itself. With such lack of clarity in the outcome, and no demonstration of a trend, it would be unreasonable to permit NECA to recoup its speculative losses at the expense of the competitive local and long distance communities. Moreover, NECA makes no effort to explain the relationship between this proposal and its request to increase its interstate access rates. Despite specific questions in the Designation Order, NECA provide no meaningful response for double dipping.

With regard to NECA's proposal to shorten the notice period for terminating service or imposing an embargo, NECA fails to respond to even the most basic Commission inquiry. It is clear from reviewing NECA's Direct Case that NECA has no basis for requesting shortened notice periods. NECA appears to be requesting shortened notice periods for the sole purpose of harassing and harming its competitors.

As detailed in the Opposition, NECA has failed to prove its case. The proposed deposit criteria and shortened notice periods are unjust and unreasonable and, therefore, unlawful. NECA's request should be denied because NECA is adequately protected and already has authority to demand deposits, the risk of loss has not significantly changed, and the rate-of-return established by the Commission addresses the risk of loss from non-payment for services. Notwithstanding NECA's hyperbole, nothing in the Direct Case supports NECA's deposit and shortened notice proposals. To the contrary, NECA's Direct Case is premature, and appears to be based solely on the Global Crossing and WorldCom bankruptcies.

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US LEC Corp., Level 3 Communications, LLC, Focal Communications Corporation, Pac-West Telecomm, Inc., Business Telecom, Inc., ATX Communications, Inc., U.S. TelePacific Corp. d/b/a TelePacific Communications, and Freedom Ring Communications, LLC d/b/a BayRing Communications (collectively "CLEC Commenters"), hereby oppose the Direct Case filed by the National Exchange Carrier Association, Inc. ("NECA") on November 21, 2002.[1] NECA seeks to change the criteria under which it may demand security deposits from carriers that purchase interstate access services to protect NECA pooling companies participating in NECA Tariff FCC NO. 5 ("NECA carriers") from loss in the event that the money owed for such services become uncollectible. NECA's request should be denied because NECA is adequately protected and already has authority to demand deposits, the risk of loss has not significantly changed, and the rate of return established by the Commission addresses the risk of loss from non-payment for services. Notwithstanding NECA's hyperbole, nothing in the

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[1] CLEC Commenters also oppose the substantially similar tariff revisions proposed by BellSouth, SBC, and Verizon, and have commented in those proceedings accordingly. *See BellSouth Telecommunications, Inc. Tariff FCC No. 1, Transmittal No. 657*, Order, WC Docket No. 02-304 (rel. Sep. 18, 2002); *The Verizon Telephone Companies, Tariff FCC Nos. 1, 11, 14, and 16, Transmittal No. 226*, Order, DA 02-2522 (rel. Oct. 7, 2002);

Direct Case supports NECA's deposit and shortened notice proposals. To the contrary, NECA's Direct Case is premature, and appears to be based solely on the Global Crossing and WorldCom bankruptcies.

At the outset, NECA admits that it cannot support its case. Of the 1,000 or more NECA carriers represented, the Direct Case only provides information regarding 35 of the NECA carriers. NECA argues that these 35 carriers represent one-third of the access lines in the Common Line (CL) pool and therefore this is sufficient. However, one-third is not sufficient. The changes proposed by NECA vest additional, extraordinary rights in all of the NECA members, not just the 35 carriers, and burdens all of the competitors of the NECA carriers. Such overarching consequences cannot be based on the input of 35 carriers. CLEC Commenters are left questioning the basis on which NECA determined the need to expand NECA carrier rights to demand excessive deposits and to decrease termination notice periods. It appears that the NECA proposals are based solely on the Global Crossing and WorldCom bankruptcies. It is unacceptable for the NECA carriers to spread the burden of these two bankruptcies on its competitors, who are already burdened by their share of uncollectibles from these bankruptcies. In sum, the NECA Direct Case is wholly non-responsive to the Commission's Designation Order.[2]

Ameritech Operating Companies Tariff FCC No. 2, Transmittal No. 1312, et al., Order, WC Docket No. 02-319, DA 02-2577 (rel. Oct. 10, 2002).

[2] *National Exchange Carrier Association, Inc. Tariff FCC No. 5*, Transmittal No. 951, DA 02-2948, WC Docket No. 02-340 (Oct. 31, 2002) ("Designation Order").

I. NECA IS PROTECTED UNDER RATE-OF-RETURN REGULATION AND CURRENT DEPOSIT REQUIREMENTS, AND NO FURTHER PROTECTION IS WARRANTED

In the Designation Order, the Commission instructed NECA to explain why it requires both an increase in security deposits and an increase in traffic-sensitive and special access rates.[3] NECA was also asked to explain "whether the variation in uncollectible levels for 2000 and 2001 is merely a normal fluctuation in uncollectibles, which would be covered by the business risks anticipated in the 11.25 percent authorized rate of return, or whether it reflects some long term trend that warrants expanded security deposits."[4] NECA has not adequately addressed either point.

A. NECA has Failed to Demonstrate a Need for Additional Safeguards

Generally, incumbent local exchange carriers ("ILECs") provide interstate access services subject to the Commission's ratemaking rules. These ratemaking rules allow for the recovery of uncollectibles. The rate-of-return rules, which all NECA carriers operate under, specifically include uncollectibles allowances within a carrier's reported revenue.[5] NECA not only acknowledges that uncollectibles are included in its rate base, but it is currently trying to expand the scope of this inclusion by increasing its interstate access prices to reflect speculative future losses.[6] The attempt to increase its prices based on speculative future losses and simultaneously to collect deposits based on the same belief is, on its face, excessive and abusive.

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[3] Designation Order at ¶ 10. *See also National Exchange Carrier Association, Inc. Tariff FCC No. 5*, Transmittal No. 952, DA 02-3100, WC Docket No. 02-356 (Nov. 8, 2002).

[4] Designation Order at ¶ 11.

[5] 47 C.F.R. § 32.4999(m) (Uncollectible revenues shall include amounts originally credited to the revenue accounts which have proved impracticable of collection.).

[6] *See* Transmittal 952.

NECA puts forth little effort to explain why NECA requires "both forms of relief."[7] NECA complains that the ability to demand deposits and shorten notice periods "do[es] not eliminate uncollectibles."[8] CLEC Commenters are unaware of any Commission rules protecting ILECs from all uncollectibles. Such special treatment is grossly discriminatory against CLECs. Further insulting is NECA's attempt to extort money from CLECs in the form of deposits and higher prices in order to safeguard NECA carriers from the current economy. As described below, all carriers are impacted by the current economy, but not all carriers have the comfort of rate-of-return regulation nor the security of a monopoly market. The Commission should remember that rate-of-return carriers are *permitted* a certain rate-of-return; they are not *guaranteed* this rate-of-return.[9] Nonetheless, the NECA carriers have been successful in collecting at least, if not more, than their permitted rate-of-return. Clearly, as discussed further below, neither form of relief requested by NECA is necessary nor appropriate at this time.

B. The One Year "Spike" of Uncollectibles does Not Support NECA's Demand for Expanded Deposit Rights

The Commission asked NECA to explain "why it believes its rates do not adequately compensate" NECA carriers.[10] Not only does NECA fail to address this inquiry, but the information proffered in response demonstrates that NECA carriers are experiencing a one year "spike" in uncollectibles in the midst of healthy returns. Based on this one year spike, NECA expects to overhaul its deposit and notice period requirements and increase its rates exponentially.

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7 Designation Order at ¶ 10.
8 Direct Case at 3.
9 *See* 47 C.F.R. § 65.700.
10 Designation Order ¶ 11.

NECA admits that it has experienced a "sharp spike" in 2002; however, NECA claims that this signals the end to the "steady, slow, and predictable growth in uncollectibles that existed during the 1990s."[11] This conclusion is pure speculation. In fact, NECA admits that the sharp spike is due to the two largest carrier bankruptcies, Global Crossing and WorldCom. It is absurd to suggest that these enormous losses (if they are losses, since the claims against Global Crossing and WorldCom are yet to be settled) will repeat themselves. With such lack of clarity in the outcome, it would be foolish to permit NECA to recoup its speculative losses at the expense of the CLEC and IXC communities. Moreover, NECA carriers have continued to receive excellent returns. The 2001 rates-of-return for common line and traffic sensitive pools are the 4th and 5th highest returns, respectively, over the past 12 years. Such strong returns do not support granting NECA carriers expansive rights to collect deposits; not even the one year spike in uncollectibles supports such a grant.

C. NECA's Direct Case is a Response to the Global Crossing and WorldCom Bankruptcies and Nothing More

In its Designation Order, the FCC directed NECA to produce specific information on individual default groups in various default ranges established by the FCC.[12] However, NECA does not identify a single default group. NECA attributes its failure to respond to this request on the inability to obtain such level of detail from the NECA carriers in a three week period.[13] NECA also fails to provide the amount of security deposits attributable to interstate access services. Based on only 35 carriers and a vague explanation, NECA arrives at a generic number, which is worthless. NECA's failure to

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11 Direct Cast at 4.

12 Designation Order at 5.

respond to these inquiries raises an obvious question: what fact finding and analysis did NECA perform prior to proposing an increase in deposits and shortened notice periods? It appears that NECA's proposals are a knee jerk reaction to the Global Crossing and WorldCom bankruptcies, a thoughtless derivative of previous RBOC filings, and nothing more.

The FCC also asked that NECA explain whether the uncollectible levels for 2000 and 2001 were a normal fluctuation in uncollectibles.[14] NECA admits that the increase in uncollectibles prior to 2002 was due to *end user uncollectible revenue*; thus, those increases provide no basis for expanded deposit requirements. Furthermore, CLEC Commenters note that there was a *decrease* in common line (CL) uncollectibles for the year 2000.

To support its case, NECA relies on the increase in uncollectibles for a single year, a year that is not yet complete, the year 2002. As explained above, this single year increase in carrier customer uncollectibles is likely a one-time phenomenon and not the basis for demonstrating a long term trend. Moreover, a significant amount of the uncollectibles is attributable to the Global Crossing and WorldCom bankruptcies and, therefore, may ultimately be collected and cannot reasonably be expected to be duplicated.

Even ignoring the probability that some of the uncollectibles will be reduced by payments to unsecured creditors, NECA's estimated 2002 uncollectibles, for which they have provided no support, must be viewed in light of NECA's entire financial picture.

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13 Direct Case at 6.

14 Designation Order at 5.

NECA reported net access revenues of slightly over $1.5 billion for the year 2001.[15] The uncollectibles reported by NECA for 2001 amount to less than .09% of NECA's net revenues for 2001. The year to date uncollectibles by NECA for 2002 are still less than 2% of NECA's net revenues for 2001. And this amount will be recovered by the proposed rates in Transmittal 939. Thus, the uncollectibles reported historically by NECA are minute in comparison to the revenues enjoyed by the NECA carriers. Moreover, the most recent spike in uncollectibles continues to be a mere fraction of a percentage of revenues. Thus, it is arguable both that the trend has not changed and the recent spike of uncollectibles is within an acceptable range.

II. NECA CARRIER LOSSES ARE ISOLATED, BUT THE PROPOSED SOLUTION IS NOT

NECA proposes to impose increased security deposit requirements on carriers that have unblemished payment records. The NECA proposal would almost certainly apply to many carriers that will never default on their payments to NECA carriers. NECA confirms that its solution is focused on carriers that, in its own view, are "likely" to default.[16] Thus, NECA's over inclusive solution is intended to punish blameless carriers that meet the vague, subjective criteria applied at the discretion of the NECA carriers. The NECA proposal is an over-inclusive dragnet, imposing burdens on carriers without justification.

NECA's Direct Case demonstrates that a small handful of carriers are causing a disproportionate amount of the losses. NECA repeatedly points to the bankruptcies of

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[15] $1,517,503,000 to be exact. Transmittal No. 939, National Exchange Carrier Association, Inc., Access Tariff F.C.C. No. 5 (June 17, 2002).

[16] Direct Case at 3.

Global Crossing and WorldCom as the cause for the increased uncollectibles.[17] Furthermore, NECA relies on the "sharp spike in 2002" to show the end of the "relatively steady, slow, and predictable growth in uncollectibles."[18] Therefore, NECA is admittedly relying on one year of uncollectibles, a year when two of the largest telecommunications carriers filed for bankruptcy, to support drastic changes to its deposit policies with over reaching harmful effects on the entire telecommunications industry.

Obviously, the issue of possible non-payment or delayed payment is the consequence of a few enormous defaults, and it is not attributable to the CLEC or IXC industry generally. The solution proposed by NECA would not be focused on these isolated losses, but would be overextended to every carrier that was deemed to be a credit risk by NECA carriers. While NECA does not propose any alternatives, NECA admits that some of just the 35 NECA carriers "have instituted increased reviews of their customer accounts resulting in timelier notices to customers that have been delinquent in bill payments" and "several companies were reviewing their customer payment procedures to improve the timeliness of the notices."[19] One would imagine that out of over 1,000 carriers, many more are reexamining their customer accounts. It would be prudent to require NECA carriers to exercise their current remedies before extending their rights unnecessarily to the detriment of blameless carriers.

Moreover, all telecommunications carriers are experiencing an increase in uncollectibles. US LEC, for example, adjusted its doubtful-accounts reserve by $9.5

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17 Direct Case at 4,5,6 and 9.
18 Direct Case at 4.
19 Direct Case at 9.

million to reflect potential losses from the WorldCom bankruptcy.[20] Interconnection of networks means that carriers are doing business with each other, in addition to doing business with the NECA carriers. Simply because NECA carriers are incumbent carriers does not necessarily mean that NECA carriers incur greater risk of non-payment than those carriers. In fact, NECA has enjoyed added protection from risk of non-payment and enjoys a rate-of-return that is enviable compared to competitive firms.

Consider, for example, the fact that CLECs lacking market power have no ability to demand security deposits from NECA carriers, even though NECA carriers owe amounts of money to them, repeatedly refuse to make payment, and have an extremely poor record of making timely payments. Due to the rural nature of many NECA carriers, the relationship between NECA carriers and CLECs is often a one way street were the CLEC is buying and paying for services. However, when NECA customers complete calls to CLEC customers, CLECs are entitled to payment for terminating services. NECA carriers often refuse outright to make payment. CLECs have been faced with onerous and time consuming processes to obtain payment from NECA carriers and, unfortunately, payment is rarely secured. NECA carriers' "unclean hands" in this matter alone warrant rejection of NECA's proposed tariff revisions.

In addition, NECA proposes to obtain additional deposits from the same carrier customers that are trying to compete with NECA carriers in the market and that depend on services provided by NECA carriers to serve their own customers. By demanding additional deposits, NECA would be in the position to exacerbate the cash flow problems of its competitors that may also be experiencing an increase in uncollectibles. Given that

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[20] US LEC Corp., Form 10-Q, "Results of Operations" (Aug. 14, 2002).

uncollectibles represent about 1% of total operating revenues for NECA carriers, the Commission should recognize the enormously disparate impact of NECA's deposit requirements will have on CLECs. As the Commission stated in its Designation Order, "an approach that has the fewest adverse effects on the competitive market while protecting NECA's interests would be preferred."[21] In order to provide marginally more security to NECA to protect a very small portion of revenues, NECA's proposal would burden CLECs that are subject to market (not rate-of-return) rate setting in no position to either submit cash deposits to NECA in order to obtain essential facilities and services, or encumber assets by securing letters of credit or other collateral arrangements.

What must be considered in connection with NECA's proposal is that NECA carriers exist in a monopoly environment in which they historically enjoy little risk of losses from non-payment overall. Unless NECA can demonstrate that firms in competitive markets have similar levels of security from non-payment, NECA has to be considered adequately protected from non-payment already. NECA has not provided that information, and its proposed tariff revisions should be rejected.

III. THE EXISTING CUSTOMER DEPOSIT CRITERIA ARE SUFFICIENT

NECA proposes to establish additional criteria regarding "impairment of credit worthiness" to determine whether it will demand a security deposit from a wholesale customer. Currently, a carrier's history of past payment is the criteria to determine whether NECA carriers' risk of non-payment has increased. NECA seeks to supplement that criteria by other measures, including a carrier's rating for its debt securities. As an initial matter, the Commission instructed NECA "to explain how each of these criteria is

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[21] Designation Order at 6.

a valid predictor of whether the customer will pay its interstate access bill."[22] NECA responded by relying on Verizon's internal analysis and generally stating that "over 90% of all rated companies that have defaulted since 1983 would have received ratings of commercially unacceptable."[23] This is an improper "post hoc ergo proptor hoc" causation fallacy that produces a misleading statistic. If NECA is truly interested in establishing credit ratings as predictors, it would reveal instead what percentage of companies rate Ba3 or lower actually defaulted in the following year. For example, if 1000 companies are rated Ba3 or lower, and only 10 of them default, it can still truthfully be said that 100% of all defaulting carriers were rated Ba3 or lower! This alarming statistic, however, disguises the more meaningful fact that only 1% of all Ba3 rated companies in this example actually defaulted. The Commission would be better served if NECA dispensed with sensational numbers and instead presented a meaningful analysis. NECA has failed to prove any link between the proposed criteria and a carrier's likelihood of default.

The reasonable measure of a company's ability to make future payments is its history of making past payments. Unless a company demonstrates a failure to make timely payments on properly billed amounts, there should be no reason to anticipate default by the company in the future. Payment history is objective and simple to determine.

IV. SHORTENED NOTICE PERIODS ARE UNJUST AND UNREASONABLE

NECA's proposal to provide customers only 10 days notice of service termination or refusal to process orders is unjust and unreasonable under section 201 of the Act and,

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[22] Designation Order at 7.

therefore, unlawful. Section 201 of the Act provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, and regulation that is unjust or unreasonable is hereby declared unlawful."[24]

In an effort to provide NECA an opportunity to demonstrate that its proposed shortened notice periods are reasonable and just, the Commission set forth a series of inquires for NECA to respond to. NECA fails to respond to even the most basic Commission inquiry. NECA does not explain why its security deposit provisions are alone insufficient to protect NECA carriers and require shortened notice periods as well. NECA states simply that "[s]hortened notice periods and increased security deposit provisions are both necessary to contain the spread of the insolvency virus, so that it does not pass on to other IXCs or ILECs."[25] This need to minimize its exposure, which arguably is covered by the aggressive security deposit, must be balanced against the harm to the public. It is impossible for customers to provision replacement services in such a short period of time, if replacement services are available at all. Furthermore, a 10-day notice would prevent carriers from complying with federal and state service withdrawal and end user notice requirements. Such a short time frame is clearly not in the public interest because it would prevent proper notice to end users and, more importantly, prevent such end users from finding alternative services. Moreover, a customer would not have sufficient time to dispute NECA carrier's unilateral decision to terminate service nor request the intervention and assistance of federal and state commission courts. Thus,

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[23] Direct Case at 20.
[24] 47 U.S.C. § 201(b).
[25] Direct Case at 25.

10 days notice to customers will likely result in disconnection of numerous end users. This grave consequence far out weights NECA's single rhetorical objective to "contain the spread of the insolvency virus."

The NECA calculations used to support its proposed 10-day notice are misleading. First, the time frame is calculated from the provision of service to the estimated disconnect date. NECA claims there are at least 97 days of outstanding charges for those billed in arrears, and 67 days of charges for those billed in advance.[26] These figures are grossly inflated and should not be relied upon. For the services billed in arrears, NECA begins its calculation on the first day service is received, even though the customer does not receive a bill for such services until long after, likely 45 days later.[27] It is inappropriate to hold a carrier responsible for services until properly billed. Moreover, bill dates are meaningless. The majority of the representative NECA carriers admit that all bills are sent by non-electronic means. This adds tremendous delay and uncertainty into the billing process and must be considered.

Delivery methods must also be considered when determining the reasonableness of a 10-day notice for termination of service. Delivery methods vary in speed, and holidays and weekends further reduce the 10-day period. The carrier would likely receive the disconnect notice late. This is clearly unreasonable.

The Commission further directed NECA to submit information for the most recent twelve months as to the timelines of its billings. NECA fails to produce the

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[26] Direct Case at 24 and Exhibit C.

[27] NECA claims that 26 of the 35 respondents deliver their bills in 5 days or less, but NECA also states that no company took longer than 11 days. Direct Case at 9.

requested information and instead provides only the average billing times. NECA provides no excuse for failing to submit information on each of the twelve months.

It is clear from reviewing NECA's Direct Case that NECA has no basis for requesting shortened notice periods. NECA appears to be requesting shortened notice periods for the sole purpose to harass and to harm its competitors. As detailed above, NECA has failed to prove its case.

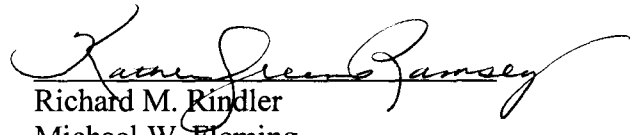
V. CONCLUSION

Clearly, the repressive and burdensome nature of the deposit requirements are far more damaging than they need to be to protect NECA's interest. They are, in reality, punitive measures designed to punish CLECs. The proposed revisions are, in fact, a knee-jerk response to the bankruptcies of Global Crossing and WorldCom. The revisions are an attempt to correct a billing and collection problem that is, as admitted, to some degree, of its own making. Inasmuch as NECA collects many of its charges in advance, it would seem to indicate a certain inefficiency, if not negligence, on NECA's part if its uncollectibles have grown unwieldy, which they have not. Instead of cleaning its own house, NECA proposes to "clean out" its customers by unilaterally exacting burdensome deposits. The simple fact is that NECA prefers to draw down the resources of its customer/competitors. Moreover, the proposed provisions are much too broadly written, penalizing customers with good payment histories. The Commission should reject them as unjust and unreasonable.

For the foregoing reasons, NECA's Direct Case does not demonstrate that it should be allowed to change the security deposit requirements for its carrier customers or to shorten its notice periods. NECA is already adequately protected under the rate-of-

return regulations. NECA's proposed deposit requirement changes are simply modifications to increase its earnings. NECA has shown no reason why such an increase is warranted. Accordingly, NECA's proposed tariff revisions should be rejected.

Respectfully submitted,



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